November 4, 2011

Cathy Sparks, District Clerk
Vallejo Sanitation and Flood Control District
450 Ryder Street
Vallejo, CA 94590

Re: Your Request for Advice
Our File No. A-11-118

Dear Ms. Sparks:

This letter responds to your request for advice on behalf of the Vallejo Sanitation and Flood Control District ("District") regarding the statement of economic interest disclosure provisions of the Political Reform Act (the "Act").[1] Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as common law conflict of interest. Also, the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 72.)

QUESTION

Do contracted attorneys qualify as "consultants" for purposes of the District conflict-of-interest code, and if so, should these individuals file a Form 700/Statement of Economic Interests (SEI)?

CONCLUSION

Yes. In performing these services, the attorneys are participating in making governmental decisions by giving advice and making recommendations to decisionmakers without significant substantive review. Therefore, the individuals performing the services specified in the contract between the District and Favaro, Lavezzo, Gill, Caretti & Heppell are considered "consultants" to the District under the Act and are therefore obligated to file an SEI.

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You are the District Clerk for Vallejo Sanitation and Flood Control District. As a requisite for your job, you recently took a conflict-of-interest code training provided by the City Clerks Association of California. As a result of this training, you believe that contracted attorneys should be filing an SEI as "consultants" for the District. The District conflict-of-interest code designates "consultants" as individuals who must file an SEI.

The District has never asked contracted attorneys to file an SEI. However, the District has had an agreement with the law firm of Favaro, Lavezzo, Gill, Caretti & Heppell since 1973 to provide legal counsel to the District Board of Trustees. One of the attorneys attends every board meeting; they review the District agenda packet, review and prepare contracts and agreements for the District, and provide other legal services as necessary. The District's attorneys have negotiated lawsuits for construction projects as well.

The County of Solano, as the District's code reviewing body, has declined to provide advice or assistance to the District pursuant to Regulation 18329.5(a)(3)(B), and consents to the Commission providing the requested advice to the District. Subsequently, you would like to know if it is your responsibility to request an SEI from the District's attorneys, whether contracted or employed.

ANALYSIS

Your request for advice on behalf of the District relates to the interpretation of the District's conflict-of-interest code. The Solano County Board of Supervisors is the code reviewing body and determines who qualifies as a consultant under the code. Where the Commission is not the code reviewing body for the conflict-of-interest code of the agency or individual questioning the conflict-of-interest code interpretation, the Commission provides advice only in situations where the individual or agency has already requested an interpretation from the code reviewing body. (Regulation 18329.5(a)(3).) In this case, the code reviewing body is requesting the Commission's interpretation in coordination with the agency and individuals in question, so the Commission is able to provide advice.

Under the Act, each agency is required to adopt and promulgate a conflict-of-interest code. (Section 87300). "Designated employees" must disclose their financial interests in accordance with the conflict-of-interest codes developed by their agencies. (See Sections 87300 et seq.; Section 82048 [defining "public official"]; Section 82019 [defining "designated employee"]. The definition of "designated employee" includes any "consultant" of an agency whose position entails the making or participating in making of a decision which may foreseeably have a material effect on any financial interest.

Typically, as is the case in the District's conflict-of-interest code, an agency's conflict-of-interest code includes designations for consultants to the agency. The term "consultant" is defined in Regulation 18701(a)(2) as an individual who, pursuant to a contract with a state or local government agency:

"(A) Makes a government decision whether to:

"(i) Approve a rate, rule, or regulation;

"(iii) Issue, deny, suspend, or revoke any permit license, application, certificate, approval, order, or similar authorization or entitlement;

"(iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

"(v) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

"(vi) Grant agency approval to a plan, design, report, study, or similar item;

"(vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

"(B) Serves in a staff capacity with the agency and in that capacity participates in making a government decision as defined in [R]egulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code [S]ection 87302."

Regulation 18701(a)(2) establishes two standards for qualification as a consultant. An individual who satisfies either standard is a consultant for the purposes of the Act. First, an individual may be a "consultant" if he or she performs, pursuant to contract, any of the actions described in subdivisions (a)(2)(A)(i)-(vii) of Regulation 18701. Alternatively, an individual may be a consultant if he or she "serves in staff capacity with the agency" under subdivision (a)(2)(B).

Performs, pursuant to a contract, actions described in Regulation 18701(a)(2)(a).

Under the first test, where the contract expressly provides for a significant amount of control and direction by the agency, which also retains the ultimate decision-making authority, the personnel of the contracting entity do not fulfill the qualifications of a consultant. (*Del Guercio* Advice Letter, No. I-01-116.) On the other hand, in the situations described by your facts where the attorneys have the authority to make decisions identified in Regulation 18701(a)(2)(A)(i)-(vii) – i.e. the authority to issue, deny, suspend, etc. any permit, license, approval, order, or similar authorization, and the ability to grant agency approval to a plan, design, report, study, or similar item – the criteria appear to be met. (See *Toschi* Advice Letter, No. I-94-197 [engineer is a consultant to the city because he has the power to grant agency

approval to a plan or similar item] and *Alciati* Advice Letter, No. I-94-205 [city geologist is a consultant to the city because he has the power to accept or reject a project even though the decision is appealable to the city council].)

Serves in a staff capacity.

Under the second test, the phrase "serves in a staff capacity" in subsection (B) has been construed by the Commission to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. It is typical to see attorneys designated in the conflict-of-interest codes of governmental agencies. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. Previous Commission advice has found that a term of more than one year is significant enough to meet this temporal qualifier, whereas nine months of regular and continuous work is not enough to qualify. (*Ferber* Advice Letter, No. A-98-118 and *Smith* Advice Letter, No. I-99-316.)

The services you have described under the contract have been performed for nearly 40 years, have involve more than one project, and will be provided on an ongoing basis. Under these circumstances, the attorney will be working in a staff capacity.

The next step in our analysis is to determine whether the attorney will either participate in making a governmental decision , or will perform "the same or substantially all the same duties... that would otherwise be performed by an individual subject to the agency's conflict-of-interest code."

Participates in making a governmental decision.

Regulation 18702.2 states that an official participates in making a governmental decision when, acting within the scope of the official's position, the official:

> "(a) Negotiates, without significant substantive review, with a government entity or private person regarding a governmental decision referenced in [Regulation 18701(a)(2)(A)];
>
> "(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:
>
> "(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)]; or
>
> "(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official

and the purpose of which is to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)]."

Generally, we have narrowly construed "significant intervening substantive review" to require more than the mere review of the recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the individual working in a staff capacity. (*Greenwald* Advice Letter, No. I-90-349.) In other words, an individual serving in a staff capacity participates in a decision even if his or her work is "reviewed" by several of his or her superiors, if those superiors rely on the data or analysis prepared by the person without checking it independently, if they rely on his or her judgment, or if he or she in some other way may influence the final decision. (*Gold* Advice Letter, No. A-93-059.)

Under the facts, it appears that the attorneys will be giving advice, or making recommendations to the District Board of Trustees or other decisionmakers, without significant intervening substantive review, by preparing or presenting a "report, analysis, or opinion" which requires the "exercise of judgment."

Accordingly, under Regulation 18702.2, the District's attorneys are considered "consultants" within the meaning of the Regulation, and are therefore required to report their financial interests in accordance with the District's conflict-of-interest code.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazinni
General Counsel

By: Sarah Olson
Political Reform Consultant

SO:jgl